

Chapter I



The Origins and Meaning of the Electoral College

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Its critics and supporters both have it right. The Electoral College does not work as it was intended to work by the Framers of our Constitution. But if it does not function as intended, then how was it intended to function?

This is a serious question with important implications for our understanding of American democracy and presidential elections. But despite its importance, scholars and pundits have given little attention to this basic concern. Most have either dismissed the question—as they dismiss the Electoral College itself—as archaic and uninteresting, or they have been satisfied to accept the prevailing notion about its origins without evidence or serious scrutiny. Both tendencies are unfortunate and lead to a very thin appreciation for the system and its founding principles.

The origins of the Electoral College are more obscure than they should be, not only because most scholars and political activists have found the subject uninteresting, but also because many have accepted an interpretation that says the Framers of the Constitution understood that the Electoral College would work to elect General Washington to be the first president but then would not likely work again. The College was, according to this understanding, a type of political mirage meant to conceal the true nature of presidential selection. That is, after Washington's election, the Electoral College would deadlock on a regular basis and throw the real selection of the president into the House of Representatives.¹

Despite a considerable lack of evidence, this “designed to fail” interpretation of the origins of the Electoral College has crept through the scholarly literature, with author after author accepting it without question. It has also found its way into American government textbooks, in which the Electoral College is typically introduced to students not only as an institution that is not useful for our own time, but also as one that was never even intended to work at all. It's no wonder that our commentators and our citizenry have found it easy to dismiss our constitutional mechanism for selecting presidents.

THE CONSTITUTIONAL CONVENTION

The mode of selecting the chief executive was one of the more difficult problems that occupied the minds of the men assembled during the hot summer of 1787. The question was voted on and assumed to be closed a number of times during the Convention, only to rise again and again to stir up the proceedings. The question of how to elect the executive

was central to the work of the Founders, since executive power itself presented a conundrum for the age of democracy and kingship.

The members of the Constitutional Convention strove to achieve a delicate tension in the mode to be used to choose the executive officer. They did not have the luxury of taking a simple course or hubristically adhering to one ideological principle at the exclusion of the lessons of history and other important values. As was the case with the entire constitutional order they designed, they had to create a balanced approach that was at once innovative in its application and prescriptive in its design.

Three basic (and in many ways competing) values animated the Convention with respect to the mode of selecting our chief executive. First, the system would need to be based upon the sound principles of the revolution. That is, it would need to find its legitimacy in the revolution's basic recognition that the people and their communities are ultimately the source of power. It would have to be republican. Second, the system would have to be so structured as to allow the president to be sufficiently independent from other entities; only then could he act his part with vigor and resolve. Third, the method of selection would need to be designed so as to encourage the choice of a person with the proper character for the high executive office. These three core values—republicanism, independence, and virtue—guided the design of the Electoral College. With this in mind, we can better understand its genius.

Various specific modes of electing the president were proposed during the Constitutional Convention, most attempting to achieve some balance between the three oft-competing goals. Though there were numerous specific manifestations of these programs, each can be placed into one of three general categories. Either they provided for popular election, election by the national legislature (or a part thereof), or election by some version of a specially chosen body of electors or other non-national figures (such as state governors). Given that our task is to come to grips with the origins of the Electoral College method of selection, it is useful to briefly explore the alternatives that developed.

THE CASE FOR POPULAR ELECTION

Polls have shown that a majority of Americans would support the replacement of the Electoral College with a direct popular election for president. In 1969 such a proposal even passed the House of Representatives, amply demonstrating that simple majoritarianism will always have an allure in a political system that values popular sovereignty and voting as highly as ours does. Simple, clear, easily understood, and comporting with our self-understanding as a democracy, majoritarianism has been the siren call of progressive historians for decades. But it has also appealed to many others throughout American history.

Was such an idea completely alien to the Founders? Were the men of Philadelphia elitists with an abiding fear of the people, as many historians have charged? The answer is complex, as is the political system they created. Yes, the Founders considered and debated the direct popular election of the president. And no, such a system did not gain much support at the Convention. But a careful look at the debates at the Convention and in subsequent ratifying conventions belies the notion that the Founders were simply undemocratic and distrustful of popular rule.

Direct popular election for president was the subject of two explicit votes by the Convention; on both occasions it was overwhelmingly defeated. On July 17, Gouverneur

Morris made a motion to have the president elected by the people, but only Morris's own delegates from Pennsylvania voted in its favor. And again, on August 24, a popular election proposal was moved by Maryland's Daniel Carroll. It was defeated without any discussion at all, and with but two states supporting the idea.

The two most regular and articulate members to speak on behalf of popular election were Morris and his fellow Pennsylvanian James Wilson. Wilson first apprehensively raised the possibility on June 1, though he openly feared that "it might appear chimerical."² Indeed, no one even seems to have felt it necessary to immediately respond to his thoughts until he rose for a second time to declare his plan, in response to which George Mason, voicing support but finding such a mode impractical, suggested postponing the discussion until Wilson "might have time to digest it into his own form."³ Ironically, what Wilson would propose the next day would in actuality be closer to the eventual Electoral College system than a direct popular vote: to have the people choose a representative from their district, who would then serve as one of the immediate electors for president.

A direct popular election of the president would of course adhere to the necessity that the system be republican. Such a system would also help encourage the president to be more independent and free to act than if he were elected directly by the national legislature, which was one of the most often proposed methods of selection. In fact, each time popular selection was raised as a possibility, it was in reaction to the Convention having entrusted the legislature with such an important power. But would a system of direct election by a national populace result in the selection of a president most fit for office, while also being representative of the genius of the political system itself?

Here again, the record is complex. Some delegates spoke in favor of direct popular election as likely to result in a good choice. Morris, for instance, said, "If the people should elect, they will never fail to prefer some man of distinguished character"; that is to say, they would choose someone of "continental reputation."⁴ Others, such as Virginia's George Mason, were not so confident in the public.⁵ What is more, many of the Founders' concerns about direct popular election involved electoral dynamics and political balances more than animus toward the public. A fear of demagoguery, a concern about competing favorite-son candidates in the states, logistical and procedural concerns about a single national election, and a need to adhere to the tensions and balances of the political system they were creating seem to have conspired against a direct election as much as any concern about the public's fitness to choose.

THE CASE FOR LEGISLATIVE SELECTION

As the vote counting, and recounting, crept forward in Florida after the election of November 7, 2000, fears began to be raised in Washington and across the country that 2000 might just be the year that the "nightmare scenario" would come true. The House of Representatives might be called to choose the president of the United States. The Supreme Court's decision to stop the recounts in select Florida counties saved Congress from having to make such a choice—and saved us all from having to witness the House of Representatives deal with this responsibility. But the Founders themselves had established the system whose back-up mechanism would be that legislative selection almost everyone hoped to avoid.

As I said earlier, some interpreters have claimed that the system of presidential election outlined in Article II of the Constitution was designed as a type of grand political shell game. On paper it would seem the president would be elected by a select group close to the people in the states, but in reality, the argument goes, it was established to routinely fail and send the actual selection of the president to the House and the selection of the vice president (perhaps) to the Senate. A close look at the Constitutional Convention and the writings of the Founders, however, provides little evidence for this interpretation.

It is true that the delegates at the Constitutional Convention did vote to have the president selected by the national legislature (or some part thereof) a number of times during the Convention. This would seem to be evidence for those who argue that the House was supposed to have routinely made the presidential choice. But if one attends closely to the context in which such votes were taken, one can expose this argument as false.

Connecticut's Roger Sherman would support legislative selection in the hopes of "making him [the president] absolutely dependent on that body"; he found independence in the executive to be "the very essence of tyranny."⁶ But Sherman is worth quoting precisely because he is so unrepresentative of thought represented at the Constitutional Convention. The overwhelming number of the other delegates shared Montesquieu's belief that the concentration of power into *any* single entity constituted the essence of tyranny. They would agree with James Madison's statement that "If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised." And he went on, "There is the same & perhaps greater reason why the Executive shd. be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty."⁷

This basic commitment to a system of independent and separated powers pervaded the Convention and was one of the most fundamental goals when constructing the executive office. To a number of delegates this concern mitigated against any form of legislative selection. To others, it could be overcome through properly constructing the institution to build a degree of insulation between the president and the legislature.

Thus, the Convention sought to provide the president with certain institutional safeguards which, it was argued, would protect him from an overbearing legislature. Among the safeguards mentioned and subject to votes within the context of legislative selection were: giving the president a certain and fixed salary that the legislature could neither raise nor diminish; having a special committee of the legislature (perhaps even chosen by lot, as in James Wilson's proposal of July 24) choose the president and then disband; or having the legislature choose the president initially, but having incumbent presidents be elected by some other body so that they would not be beholden to the legislature for re-election.

The two most serious and regularly occurring proposals, however, were to subject the president to term limits and to make each term lengthy. These proposals often combined into a single six-year term for the president. However, to many, this medicine proved worse than the disease. Gouverneur Morris, for instance, argued that any kind of term limit on the president would encourage him to "make hay while the sun shines," while others spoke of the problems inherent in a lengthy term.⁸

Support for legislative selection was almost always expressed in combination with one or more of these institutional innovations. And when such safeguards were not present, support for a legislative mode of selection rapidly diminished. As James Wilson would put it starkly, “[It] seems to be the unanimous sense that the Executive should not be appointed by the Legislature, unless he be rendered in-eligible a 2d. time.”⁹ Following Wilson, James Madison went further:

It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature. This could not be if he was to be appointable from time to time by the Legislature. It was not clear that an appointment in the 1st instance [even] with an ineligibility afterwards would not establish an improper connection between the two departments.¹⁰

Thus, if one looks closely at the debates during the Constitutional Convention and the votes of the men who drafted the Constitution, one can see quite clearly that there is little evidence for the thesis that the Electoral College was a jerry-rigged system designed to regularly “fail” and send the ultimate decision to Congress. The Founders were too concerned to make the president independent of the legislature to agree to such a scheme of legislative selection, unless the president could be insulated from legislative control. Whenever the Convention demonstrated a commitment to legislative selection, it was always within the context of just such presidential insulation—usually in the form of term limits or a single, lengthy term. Except for the minor element of the legislature not being able to raise or cut a president’s salary once he is in office, none of these institutional safeguards were included in the Constitution of 1787.

To assume that the Electoral College was just a throwaway institution the Framers realized would fail is to argue that the delegates completely abandoned all their concerns expressed throughout the summer concerning legislative tyranny. Such a reading goes against all the evidence.

A THIRD WAY: THE BIRTH OF THE ELECTORAL COLLEGE

With both direct popular election and election by the national legislature having proven to be problematic, a number of delegates argued for one or another version of a “third way” that would avoid the problems of the other two. In each of these proposals, specially chosen electors or other elected officials were to choose the president. And various modes were suggested for selecting the electors—from popular election, to selection by the state legislators or executives, to allowing the states to choose the mode of selecting the electors themselves (the latter solution would eventually be incorporated into Article II of the Constitution). Elbridge Gerry even suggested that the state legislators—and on a separate occasion that the state governors—be empowered to directly choose the chief magistrate.¹¹

The electoral compromise position that eventually became part of the ratified Constitution was hammered out by Brearley’s “Committee of Eleven,” which reported to the Convention on September 4. Before the Committee reported its changes, the plan had been for the president to be chosen by legislative selection and to serve a single, seven-year term. As Roger Sherman noted almost immediately, the plan set forth by the committee would eliminate the ineligibility for re-election that was part of the plan of

legislative selection, and it would also ensure the president's independence. After Madison voiced a concern about the voting methods of the contingency elections in Congress, Edmund Randolph and Charles Pinckney asked for a detailed explanation of the change in mode of election. Gouverneur Morris rose to express the Committee's views as well as his own, and Madison's notes of his remarks deserve a full recounting here:

The Ist. was the danger of intrigue & faction if the appointmt. Should be made by the Legislature. 2 the inconveniency of an ineligibility required by that mode in order to lessen its evils. 3 The difficulty of establishing a Court of Impeachments, other than the Senate which would not be so proper for the trial nor the other branch for impeachment of the President, if appointed by the Legislature, 4. No body had appeared to be satisfied with an appointment by the Legislature. 5. Many were anxious even for an immediate choice by the people—6—the indispensable necessity of making the Executive independent of the Legislature.—As the Electors would vote at the same time throughout the U.S. and at so great a distance from each other, the great evil of cabal was avoided.¹²

What we see here in stark relief is Morris's summation of the motivations of the Committee, which hinges upon the undesirability of legislative selection. If they would have retained legislative selection they would have had to keep the re-election ineligibility requirement, which raised considerable problems of its own, such as the negation of the incentive for good behavior that some delegates mentioned would come with mandatory rotation or a limit on terms. Importantly, five of the six elements listed by Morris directly relate to the relationship between the executive and the legislature and the problems with allowing the latter to choose the former.

Morris's summation, which was not contradicted by any of the other members of the Committee, is significant evidence that the Founders did not intend the national legislature to routinely select the president. In sum, the Electoral College was not some ignoble compromise. It was not designed as some sort of constitutional tissue paper that for a time would cover the fault lines of the Convention only to dissolve away with the passing of Washington from the public stage. It was not, to wit, designed routinely to fail and send the selection of the president into the House of Representatives, as some of the College's critics continue to contend.

THE ELECTORAL COLLEGE AND THE FOUNDING PRINCIPLES OF AMERICAN GOVERNMENT

The Electoral College was to be a method of electing the president that in many ways would closely resemble the constitutional system writ small. The selection of a good man to be president, it was hoped, would work similarly to the way good public policy was supposed to emerge from the political system—that is, through the efforts of the most qualified people working under conditions that would encourage mature discussions. In the case of the political system, the desired end was public policy that would not threaten the system or any one part of it and would further the national good. Likewise, it was hoped that the Electoral College would result in a president with the qualifications and interests necessary to serve the public well. Properly understood, the Electoral College and its origins point to the ideas and values that undergird the entire American

constitutional system as these were embedded in the foundations of the Electoral College itself.

***Free Government:
Republicanism, Responsibility, and Responsiveness***

The Founders were republicans. They were dedicated to a political system that would be based on “the consent of the governed” and that would be representative in form and function. The men that held the power to make decisions for society would be representatives of the people that were somehow accountable to them and would not be likely to threaten either their liberties or those of their freely chosen state and local governments. James Madison would define a “republic” as

[a] government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their office during pleasure for limited periods, or during good behavior. It is *essential* to such a government that it be derived from the great body of society, not from an inconsiderable proportion or a favored class of it.... It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified.... [emphasis in original]¹³

Once we remember that the American Founders were not monarchists or antidemocratic, we can understand that there can be a diversity of electoral types that are legitimate in a representative system of government, and the less likely we may be to assume (as is the trend in our contemporary political culture) that direct democracy is the only legitimate electoral form.

Of the constitutional system designed to elect the president, Alexander Hamilton would write in *Federalist* 68, “It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided.” The Founders believed it important that the people’s best judgment should be felt in the presidential election system. But they were also very concerned with the product of the system. The inputs must be republican and must adhere to solid principles of free government. To the Founders, however, that did not require a one-size-fits-all mass democratic polity. The system the Founders settled upon was infused with “the sense of the people” while adding elements of other values and institutions that combined to produce presidents most likely to serve the common good.

And how would they serve the common good? At least in part, presidents would serve the nation in a manner similar to what then-Senator John F. Kennedy would immortalize 150 years later in his book *Profiles in Courage*.¹⁴ They would serve the public good by resisting the temporary gales and gusts of public thought that are contrary to that public good. Rather than requiring elected officials to do what is popular, Alexander Hamilton would argue, “The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion or to every transient impulse which people may receive from the arts of men, who flatter their prejudices to betray their interests.”

Hamilton would go on to lay the foundations of a type of leadership that seems to become more difficult every year, with the proliferation of public opinion polling and the dependence of presidential success on the shifting sands of the public mind:

When occasions present themselves in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests to withstand the temporary delusion in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to men who had courage and magnanimity enough to serve them at the peril of their displeasure.¹⁵

Republican government demands our elected officials be *responsible* for their conduct but not that they be immediately and robotically *responsive* to every turn of the public mind. Because it is composed of a temporary body of top citizens, the Electoral College seems designed to encourage presidents who would serve in the way Hamilton indicates, while it also constantly reminds them that they will be held responsible for the results of their actions at least every four years (in addition to the ever-present threat of impeachment and removal).

The Electoral College also reminds us of an alternative to today's dominant political ethic, which equates the immediate election of the people—pure and simple majoritarianism—with good government. The Founders held to no such simple and dogmatic formula. They insisted that the new government they created be free and rest on the firm foundations of republicanism, but they were equally concerned that the government be good. In their assumption that the election process itself is more important than the president produced, the critics of the Electoral College (and to a large extent our political culture itself) seem to have adopted a reverse utilitarianism: “the means justify the ends.” But the Founders strove to balance their concerns between process and product. To paraphrase Walter Berns's argument at the conclusion of this book, why has there never been a critic of the Electoral College who has argued that a direct national election would produce *better* presidents?

And here I think the Founders are particularly instructive. Without challenge, we have come to assume that direct and unfiltered democracy is always right in every case and in every situation. We have come to see it as the only really legitimate way of conducting free government, and we have even expanded that basic ethical premise into the routinization of public opinion polls to gauge the “legitimacy” of public figures and policy options. But the existence of the Electoral College gives us the opportunity to pause and question those assumptions, and in so doing to revisit the foundations of our republic in a complex and representative form of government.

Virtue

Some have contended that the American Founders were largely unconcerned about the quality of office holders in the American political system. Rather, the argument goes, they sought to establish a system in which the ambitious would check the ambitious and not much would be accomplished. In such a way a stable political system would be

produced. This is a common misreading of the Founders' project and of the political theory of their time.

Far from being unconcerned about the men who would take positions of influence and prestige, the Founders were very concerned about the qualities, character, and knowledge the nation's elected presidents would possess; in short, they wanted to ensure that the chief executive would possess that modicum of virtue necessary for free government to flourish. And this goal is not unique to the presidency. It is actually characteristic of the dominant political theory of the time. Indeed, James Madison would write in *Federalist 57* that "[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."¹⁶

The Electoral College method of electing the president was in part designed to maximize the chance of having such a leader elected president. Alexander Hamilton maintained that the system would select "some fit person" to be president.¹⁷ The means of selection, the Electoral College, would produce the desired end, the election of a recognized and experienced leader who would administer the executive branch as well as serve as a fitting symbol of national unity. Such a person would be found through a system that was deliberative, republican, and decentralized.

Though perhaps a bit overblown in his rhetoric, Alexander Hamilton seemed to believe that the Electoral College system was so well constructed as to afford "a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications."¹⁸ It is no accident, and is quite instructive to contemplate, that the only two times the Electoral College method was called into service and worked as intended it settled unanimously on George Washington.

Time and Deliberation

The Founders were convinced that good decisions are more likely to be made when people take time to think, discuss, and deliberate with one another. And so they established a system designed to encourage these processes to occur before public policy decisions were made. As Alexander Hamilton would write, "The oftener the measure is brought under examination, the greater the diversity in the situation of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest."¹⁹

Thus, the House of Representatives would be constituted of diverse men from various regions who would have to work together to produce legislation. Each state would send two top citizens to the United States Senate, where they would work with their peers to craft laws for the nation. The House would then be required to cooperate to pass bills that might become the laws of the land. If a bill survived this cooperative and deliberative effort, it would be sent to the president, who could sign it into law or could wield his veto power to reject it. It should be noted that the presidential veto power is not absolute but can be overridden by the deliberative process of Congress. The President must also submit a list of reasons for his veto. At every turn, the Founders set up a system to encourage a slow and truly deliberative process.

The Electoral College was established to encourage the selection of a good president in just the same way. The selection process would bring together in a deliberative environment, in their respective states, trusted public leaders, who would discuss top candidates and settle upon the best available chief executive for the nation. Alexander Hamilton summarized this situation in *Federalist* 68 by saying that it was desirable that the selection be made by a group of top citizens “acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice.”²⁰

If this state-by-state process failed to give any single candidate a majority of votes cast, a similar process was established for the House of Representatives. Votes in the House would not be distributed to individual members, however, but to states—each counting as a vital political community and having one vote. This contingent process would thereby be deliberative at two levels. First, members of each state delegation would have to meet together to resolve on one person on whom to bestow their single vote. This process would tend to work against more radical or fringe candidates and in favor of moderate and compromise choices because of the fear that any delegation that could not arrive at a single choice would be disenfranchised in the selection process. Second, that initial choice would occur with an eye toward the choices of the other states and the likely vote distribution in the House. If a single candidate still failed to garner a majority of the states in the House, all the state delegations would continue to meet until this complex process within and between the state delegations resolved itself into settling on a fit candidate for office. Throughout, the deliberative process in Congress would be informed by the results obtained from the state electors, as the Constitution required the House to make its choice from among the top five candidates submitted by the state electors.²¹

Whether the selection ended with the electors voting in the states or with the House of Representatives, the process was never designed to be quick and easy. It was to be decentralized, slow, and above all, deliberative. It would not be quick, clean, or without controversy. But the result would be a president that was more fit for office than one selected through a hastier and less thoughtful process.

Federalism

The democratization of American politics has spawned a general political culture that considers any deviation from the basic assumptions of mass democracy as illegitimate. In America—and now we have taken to exporting this doctrine around the world—no system must stand that is not clearly laid upon the foundation of “one man, one vote.” Though critics conveniently forget about the U.S. Senate’s violation of that principle in its very structure, the Electoral College is seen as illegitimate and undemocratic for its failure to conform to this tenet. Thus, almost all of the Electoral College’s critics would replace it with a single national plebiscite consisting of an aggregation of individual votes from across the nation.

As I have tried to show above, the Founding Fathers had a more complex and rich understanding of democracy than do many of today’s pundits and politicians. They were convinced it would not be conducive to our common good to confine the political system to a simple and single formula of direct democracy. Rather, they established a complex system anchored to the more solid and varied foundations of a federative republic. As

James Madison explained so clearly in *Federalist 39* (see Appendix II), our Constitution is like a table with one leg upon the national community of individuals, a second upon the states directly as vital political entities, and yet a third upon a compound bond between the two. The Constitution itself was ratified by the votes of the states as sovereign states, not by a national referendum. Indeed, the ratification process was so constructed as to forbid any majority of states from binding the minority who did not freely choose to enter the new compact. Representation in the lower house of Congress was to be distributed according to population on a roughly one-man, one-vote proportional basis. But in the Senate, the states would exist as equal political entities, no matter their size in geography or population. The central government would act with power to compel individuals directly, which would add another national element to the system, but the states were to retain considerable authority over most functions of government, which adds another federal aspect for balance.

Mirroring the system as a whole, the presidential selection process was to be compound—both national and federal. The distribution of electors would partly be based on population (representation in the House) and partly on the states as autonomous political units (representation in the Senate). The system would be fair to both large states and small states, more populated regions and more rural communities. The process of selecting electors would occur separately in each state (and the method was left up to the people of the states to choose), and these electors would meet and deliberate within their own states. If the vote of the electors failed to resolve upon a single candidate, the more directly elected House would choose the president; however, House members would vote as single state delegations, adding yet another federative balance.

Understanding the origins of the Electoral College reminds us of the great care the members of the Constitutional Convention took to create a system with broad and strong foundations sunk deep into the complex nature of the Union. Though we celebrate diversity in other fields, the trend in modern America is toward a homogenization of our public life. The attempt to reduce the selection of our presidents to simple national plebiscites is just one of the latest manifestations of the leveling wind of democratization, which has given the Supreme Court control over state legislative elections and which has pundits and academics preparing the way for a new “virtual” politics of Internet connections and mouse-click democracy.

Discouraging Demagoguery

The Founders realized that there was a tendency in democratic politics, a phenomenon recognized by Plato, for ambitious democratic politicians to resort to inflammatory, dangerous, and divisive rhetoric in order to win votes. And they realized that this was a particularly dangerous possibility with regard to the selection of a single national president. Under the tactic of “divide and conquer,” an unscrupulous candidate could cause great disruption in the social fabric by seeking to exploit class, regional, religious, ethnic, and possibly even racial differences. Rather than creating “a more perfect union,” the stated goal of our Constitution, such a candidate would encourage ignorance and disunion, because in these he would find power and prestige.

Several years ago, former President Jimmy Carter opined that it was time for America to revive the term “demagogue” and to not shy away from calling those politicians that appeal to our baser instincts by that name. He was returning to an understanding of democratic politics that is closer to the American founding than is the general political

trend in America. The Founders were steeped in the history of the republics of Rome and of the democracy of Athens. From ancient history they knew the power a skilled orator could have over a populace. And the twentieth century, of course, provided fresh examples in the form of Hitler in Germany, Stalin in the USSR, and innumerable “softer” demagogues in America and all over the world.

In anticipation of such men, the Founders established what Alexis de Tocqueville would later call “forms.” They believed that demagoguery flourished when all power was vested in a single entity (whether that entity was a single person, a small group, or a simple majority of the population itself). So they created constitutional institutions and mechanisms that would channel and control passions, ambitions, and demagoguery into safe and possibly even useful avenues.

In *Federalist* 10, James Madison attempted to show that the new constitutional order provided a way to deal with the problem of factions, which he defines as “a number of citizens, whether amounting to a majority or minority of the whole, who are unified and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”²² He here showed particular concern for factious political leaders and argued that the Founders wished to make it “more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried.”²³

Alexander Hamilton made the point even more clearly by extending Madison’s concern to the election of a president, saying that the Constitutional Convention desired “to afford as little opportunity as possible to tumult and disorder,” and that the system was set up to limit the “heats and ferments, which might be communicated” to the people at large. He added, “Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption.”²⁴

In the age of the thirty-second commercial, the six-second sound bite, and the racial divisions evident in our latest election for president, the Electoral College reminds us that a direct national plebiscite may not be salutary. Will destructive demagogues be further encouraged? Will our political life as a nation be further coarsened and our divisions widened? These are among the important questions that are raised by the specter of the Electoral College’s abolition.

Separation of Powers

In his *Notes on the State of Virginia*, Thomas Jefferson wrote, “One hundred and seventy-three despots would surely be as oppressive as one,” in his argument that concentration of government power “in the same hands is precisely the definition of despotic government.” James Madison would claim, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”²⁵ Perhaps no other principle of the American Founding is better known today than this basic presumption in favor of divided and distributed power. Every schoolchild knows the three branches of government, and nightly on our news programs we are witness to the courtship rituals (and sometimes to what seem more like divorce proceedings) between the executive and legislative branches of government.

Power was first split by the Founders between the states and the federal government. Those limited powers explicitly ceded to the national government were then further

divided between the legislative, judicial, and executive departments. Each of those departments would be composed of diverse people who would hold their offices under various conditions and for various lengths of time. Perhaps most importantly, because the most important question is always where ultimate power rests, the various institutions were to be peopled with men chosen from a variety of constituencies selecting under a variety of formulas.

Likewise, if things went as planned, the president would be the choice of concurrent and deliberative processes in various states. The electors would be selected specifically to meet, deliberate, and cast their ballots for president and then would promptly dissolve as a body. A temporary body such as this made it less likely that the electoral process could be tampered with and that some preexisting body could choose, and thereby control, the chief executive. The entire presidential electoral process reveals the Founders' notion that power ought to be distributed and diluted. And to the degree that our political culture and institutions become animated by a simple plebiscitary ethic—which we can see in the proliferation of polls, focus groups, and political consultants—the closer we come to the single national system of concentrated power nearly all the Founders feared.

The Rule of Law

Understanding the origins of the Electoral College also reminds us of the importance of the rule of law to the American political experiment. As I have already conceded, the Electoral College is not simple and efficient. But neither is sustainable free government. The simplest form of government might be the tyranny of an individual, but how far is that, really, from the tyranny of the majority in a simplistic majoritarian system?

Quite simply, to say that America is governed by the rule of law is to recount the old phrase that we are a nation of laws and not of men. We are not to be treated differently because of our race or class, justice should not be for sale, and offices are to be earned through legal means and not purchased with cash or favors. Similarly, no person is made president simply because of the cheer of a crowd or his standing in the Gallup poll. Rather, presidents are made according to constitutional principles, legal proceedings in the states, and an aggregation of concurrent majorities all over the nation.

In a perverse sort of way, it was almost fitting that the presidential election of 2000 ended with a decision of the United States Supreme Court. By bringing a halt to the nearly lawless process of counts and recounts with floating standards in select communities in Florida, the Supreme Court reminded us all that as long as the Electoral College survives, at least, our presidential elections will be governed by the rule of law and not of men. Not much more could be asked of any institution in a free society.